OGC Has Reviewed

SUBJECT: CIA Appointive Authority

1. P. L. 253, approved November 1, 1951, contains the provision "The Civil Service Commission and the heads of the executive departments, agencies, and corporations shall make full use of their authority to require that initial appointments to positions in and outside the competitive civil service shall be made on a temporary or indefinite basis in order to prevent increase in the number of permanent personnel of the Federal Government above the total number of permanent employees existing on September 1, 1950.....". The passage of this provision raises the general issue of its applicability to the CIA--more explicity whether the provision impairs or affects the capacity of the CIA to make permanent appointments.

2. CIA authority to make permanent appointments has been predicated upon EO 10180, which authroizes, in contravention to the general moratorium imposed upon permanent appointments under the 1950 Whitten rider, the making of permanent appointments by the CSC or by heads of departments whenever the interest of the Government warrants. EO 10180 was issued in order to effectuate the original Whitten rider. However, the Whitten rider provision, embodied in PL 843, was superseded by a similar provision in PL 253 containing the essential substance of the original rider. Since EO 10180 was issued in order to ameliorate and delimit the applicability of PL 843, the current status of EO 10180 has been questioned.

3. A perusal of the provision of PL 253 quoted above reveals that the language places a charge upon the CSC and heads of agencies to make full use of their authority to provide for temporary appointments. Further, it does not explicitly list exceptions to the requirement. Thus, provision for temporary appointments in the civil service clearly appears to be both a directive and a matter of legislative intent. This point, however, does not necessarily connote that permanent appointments cannot be made. As a matter of logical construction, the phraseology "shall make full use of their authority" could be interpreted to mean that in a situation where both temporary and permanent authority exists, appointing officers shall maximize application of the former. The ambiguity of the language affords a basis for contending that the directive is not all inclusive. STAT

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4. The controversy over the present status of EO 10180 stems from the fact that it was issued as an elaboration of PL 843, which was subsequently superseded by PL 253. The allegation that EO 10180 and/or the authority to make permanent appointments contained therein is no longer effective is based upon the assumption that the Presidential authority for issuing the Order was PL 843; the evidence, however, does not appear to substantiate this position.

5. EO 10180 states, "By virtue of the authority vested in me by Section 2 of the Civil Service Act (22 Stat 403), by Section 3 of the Civil Service Retirement Act of May 29, 1930, as amended by Section 3 of the Act of January 24, 1942, 56 Stat 15, by Section 1753 of the Revised Statutes (5 USC 631), and in effectuation of the purposes of Section 1302 of the Supplemental Appropriation Act, 1951 (Public Law 843, 81st Congress) it is hereby ordered....."

6. Two things are noteworthy about the President's citation of these authorities: (1) a number of authorities are cited as bases for the EO, and (2) PL 843 is not cited as an authority for the Order, at least directly, nor does the Order expressly state that the Law constitutes an authority for the Presidential action. Instead, the purposes of PL 843 are cited as a reason impelling the issuance of the Order.

7. The scope of EO 10180 is broader than the issue of permanent appointments, for example, a retirement provision is included. Since citations of presidential authority to issue retirement regulations are expressed, there is a strong presumption that this phase of the Order is still operative. Therefore, the real issue is whether that part of the Order which relates to the making of permanent appointments has been nullified by PL 253. Two principal interpretations are applicable to this question. First, the Order does implement the requirements in PL 843 for making temporary appointments by extending the period of temporary appointments for the duration of the emergency. However, the proviso of the Order which permits the making of permanent appointments does not effectuate the purposes of PL 843 but, instead, achieves the opposite effect by authorizing the continuance of permanent appointments when the interest of the Government requires. It is difficult to support the view that the provision in PL 843 requiring only temporary appointments provides the basis for provision in the Order which authorizes permanent appointments. Presumably, the Presidential authority for limiting the application of the original Whitten rider was based upon 5 USC 631 and 22 Stat 403, which vest in the President the power to prescribe regulations for admission of persons into the Civil Service of the United States. Another indication that the [redacted] authorization for making permanent appointments is based upon the President's general civil service rule-making power, and not on PL 843, is the grant of authority in the Order to both the CSC and heads of departments to make permanent appointments, whereas PL 843 only relates to action by the CSC.

8. Second, there is a question whether the President had the authority to authorize permanent appointments in EO 10180, in view of the possible inconsistency of the Section with PL 843. If the authority for the Order is assumed to be PL 843 there is strong doubt, and if the more tenable position is taken that the authority is based upon citations 5 USC 631 and 22 Stat 403 the question still remains, since the President must exercise his rule making power consistent with statutory provisions. The question is largely academic, however, since operations have been conducted under PL 843 and EO 10180. Certainly it would be presumptuous for appointive authorities not to comply with the Order because of misgivings concerning its validity.

9. In sum, the section in EO 10180 for making permanent appointments is apparently based upon other authority than the now superseded PL 843 and was apparently valid despite its limiting effects on PL 843. If this construction is correct then the replacement of the restrictiveprovision on permanent appointments in PL 843 by a similar one in PL 253 does not alter the continued applicability of the authorization for permanent appointments contained in EO 10180.

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